UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	.	
	.	
Plaintiff,	.	No. 10-cr-04246-JM
	.	
v.	.	November 13, 2013
	.	1:30 p.m.
BASAALY SAEED MOALIN, ET AL.,	.	
	.	
Defendants.	.	San Diego, California

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE JEFFREY T. MILLER
UNITED STATES DISTRICT JUDGE

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SAN DIEGO, CALIFORNIA; NOVEMBER 13, 2013; 1:30 P.M.

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THE COURT: Good afternoon, everyone. Please be seated and make yourselves comfortable.

THE CLERK: Calling matter 1 on calendar, 10-CR-4246, U.S.A. v. Basaaly Saeed Moalin, Mohamed Mohamed Mohamud, Issa Doreh, Ahmed Nasir Taalil Mohamud, set for motion hearing.

THE COURT: Counsel, would you please state your appearances.

MR. DRATEL: Good afternoon, Your Honor. Joshua Dratel for Mr. Moalin, with Alice Fontier from -- not from my office, but she is with me today, and Mr. Moalin is seated with us.

MS. FONTIER: Good afternoon, Your Honor. Good to see you again.

MS. MORENO: Good afternoon, Your Honor. Linda Moreno on behalf of Mr. Mohamud, who is present.

MR. GHAPPOUR: Good afternoon, Your Honor. Ahmed Ghappour, on behalf of Mr. Issa Doreh, who is present.

MR. DURKIN: Good afternoon, Judge. Tom Durkin on behalf of Mr. Nasir Mohamud, who is also present in custody.

MR. COLE: Good afternoon, Your Honor. William Cole, Steven Ward, and Caroline Han for the United States.

THE COURT: Thank you all.

This is the time set for the hearing on joint motion for

new trial. Just a couple of preliminary matters, Counsel. I have been through the papers. I am familiar with the issues. I certainly welcome any additional comments or arguments you may have. If you wish to underscore something, emphasize something, you certainly may. I am not going to place time limits on your arguments.

THE CLERK: Your Honor, I believe the interpreter is having a hard time. (Pause.)

THE COURT: Are we okay?

THE INTERPRETER: Yes, sir.

THE COURT: Continuing on, I don't wish to impose any arbitrary time limits, but I am familiar with the issues, and I have spent quite a bit of time already preparing for this hearing.

I will take the matter under submission after the arguments today, and it is my present intention to have an order ready for filing by 2:00 p.m. tomorrow. So that is my current thinking on the matter in terms of procedure.

And with that, if you would like to proceed further, you certainly may.

Mr. Dratel, would you like to start?

MR. DRATEL: Yes. Thank you, Your Honor.

And from experience, in anticipation of what the Court said, I am not going to go through the papers. I am going to try to -- this is a situation in which there's ample material

that's not in the papers, not only because the universe of it is so wide but also because things have been occurring on a regular basis since we filed the papers and I wanted to incorporate some of that as well. There has been a continuing set of disclosures as well as analysis. It could be a full-time job keeping up with this particular issue in the sense of what academics and journalists have produced even since we filed our papers, and even what the government has released as well in terms of previously classified materials.

I want to start with -- just go back to the fundamentals about FISA, in the sense that FISA was created not to expand government power; FISA was created to restrict government power. FISA is a Congressional statutory mechanism designed to regulate what had otherwise been treated as an entirely discretionary act of the executive branch, and that the U.S. District Court case, which eliminated warrantless domestic security surveillance, electronic surveillance, nevertheless explicitly left open the question of foreign surveillance.

So FISA was a reaction to many of the abuses that were disclosed during the Church Committee process and the report. And we are facing that again in the context of this particular motion; however, there are limits as to what this motion seeks and what it addresses in the sense that I think the timing and time frame are critical in this sense. This is not about the entirety of Section 215 or 861 -- 50 U.S.C. 861, which I may

describe as 215; that's the colloquial way it has been treated in the analysis -- but it is not about the entirety of that program. It's not about how the program exists today after a series of FISA Intelligence Surveillance Corps, or FISC -- F-I-S-C -- opinions or protocols instituted by NSA or the F.B.I. or by FISC itself, and not whether or not that's lawful right now in the program itself, but rather, in the latter part of 2007, when this transmission of information occurred from NSA to F.B.I., linking with Moalin, whether at that point the program was operating legally or illegally and, with respect to this particular collection, retention, transmission with respect to Mr. Moalin, whether it conforms with the statute and with the Fourth Amendment. And we submit, obviously, it does not.

Also, while the technological issues and the methodologies are somewhat complex, and they are multiple, regarding -- and I am going to discuss some of them -- the Constitutional analysis is traditional, which is that along the chain of acquisition of evidence, with respect to Mr. Moalin, if there is an illegitimate link anywhere along that chain going forward, the "fruit of the poisonous tree" doctrine applies and would require suppression of anything going forward from that point.

And part of what I have attempted to do today is illustrate in many respects the links in that chain as they exist on different -- multiple sides of the equation in terms

of the collection of this information, how it's used, and how it's connected to other and compared with other information, other data.

Also -- and I understand the Court's intention, but I think that, to a certain extent, a decision is not quite ripe in the sense of denying the motion. I think to grant the motion, there's sufficient evidence and sufficient information available to the Court, but to deny it may be on incomplete information. And the reason I say that is there's information that is apparently going to be released in the course of an ACLU lawsuit that's ongoing in the Southern District of New York. I understand that as early as Monday we may have release of preceding opinions, perhaps from 2006 -- which is the critical time for this particular motion -- and we don't have those yet. So in that context -- as justification for the program itself.

So there's a lot of material, and there's also material that's come out, analysis and other types of material, that's been issued by academics, by former justice department officials, by journalists, that relate to what we are talking about. And I think some of it is important in the context of -- it is important for me to understand as well, so I think it's important in that sense. And so, in that context, I am not sure it's ripe in that regard, but I understand the Court's intention.

And the context of what that does to sentencing is not really an issue because there are technical ways that if the Court desired to go forward with sentencing it could still go forward with sentencing and just not issue judgment or something like that. That would keep the Court's ability to incorporate additional information as available.

I think it's important to reiterate one thing that is in our papers, but I want to reiterate at the outset, because I think it is important, is that we do distinguish -- rather than characterize the government as an entirety, we do distinguish between different branches of the government. And here we are talking in many respects -- when we are talking about the collection, retention, comparison, all of the acquisition of evidence, all those issues are really involving the intelligence community and not the prosecutors here, who are given, in many respects, a finished product. That may very well be the tip of the iceberg and only seeing what is above the surface and only able to provide the Court information about what is above the surface because I am not sure they know themselves what is beneath the surface with respect to the background of some of these intelligence methodologies as it applies particularly to this case.

And in that context, when we talk about the FISA, the FISC decisions, and the nature of disclosure that the government has made to the FISC, we find in these cases, one after another,

dating back to 2002, that the government has been found to have lied to the FISC on a repeated basis, about not only -- at the time that we filed our initial brief, it was about FISA itself, and the wall, in 2002; then in 2011, there was a decision about 702 -- which is also an issue in this case, and I will get to it -- but since we incorporate in our reply a 2009 opinion addressing this very program in the time frame that we are talking about, that misrepresentations made to the FISC not only in the context of misstating facts, but clearly NSA didn't understand what it was doing. There was no one at NSA that had a full level of appreciation of the whole process. And I don't understand how that could be Constitutional or even statutorily compliant given that fact and given the fact that the Court, even the FISC in a non-adversarial setting, has found that.

The supplemental authority that the government has provided to the Court is a decision in all respects designed to meet rather scathing criticism of a decision that was released in August. In June, we have disclosures about the programs. In August, the government -- a FISC judge issues an opinion, which the government immediately releases, designed to justify the programs, met with withering criticism from everyone and absent failure to address important legal issues.

And back in October, after we filed all our papers in fact, the FISC issues another opinion, which merely says, essentially, that the *Jones* decision doesn't apply until the

Supreme Court says it applies, and *Smith v. Maryland* still controls, leaving aside a host of other issues. And that decision itself is subject to the same criticism that was leveled against the initial decision by the FISC in August.

And I don't know how to respond to the ability to go to court and get a decision without an adversary just to meet the needs of litigation going on around the country and to meet the political needs to explain to either the Congress or people in some way -- inadequately, but nevertheless to do that. And if I had the opportunity to do that, I would be in a different situation all together, and I don't. And I think that is a question of fairness in terms of the process that has to be addressed here in an Article 3 setting. And I can't pretend that that emperor has clothing, and all of the scholarly analysis of those opinions confirms that, and it's also not binding on the Court.

I want to talk a little bit about factual background so we set a chronology as to what we are talking about and how it fits into the statutory/Constitutional violations that have occurred. There was, according to the Deputy Director of the F.B.I. and the head of the NSA in public statements, some under oath, since June, that -- and this is the first we heard of this -- there was a 2003 investigation of Mr. Moalin conducted that -- and I am quoting here, and I will start with the quotes -- but that the Deputy Director of the F.B.I. said

showed, quote, "No nexus to terrorism," close quote, and, quote, "Did not find any connection to terrorist activity," close quote. So we have a 2003 investigation that didn't yield anything.

That was started on a tip -- that's all we know -- sometime in 2003. We don't know the legitimacy of that tip. Was that tip the basis of some other illegitimate surveillance program which was ongoing at the time, the Terrorist Surveillance Program, also known as TSP, a warrantless surveillance program that was essentially continued under Congressional authority after 2008? But in 2003, there was no authority for it. So we don't know what the nature of that tip is. And that's one area in which the link in the chain could be defective.

And what's also interesting about that is the entire section of the government's response, the public's response, the entire section about the prior investigation is redacted. So that also calls into question the nature of that tip and how that investigation was conducted and what it collected because there's also a First Amendment issue involved here, which we briefed and I won't go into.

It's also inconceivable that an investigation in 2003, less than two years after 9/11, given the intensity of what that investigation must have been like, that to conclude there was no connection to terrorist activity, that it did not yield

any *Brady* material, that it did not generate any material that we could be provided that is exculpatory. Because this case is not about one incident. It is about a course of conduct, and about intent, and knowledge and intent. And to the extent there was a suspicion of Mr. Moalin back in 2003, based on some tip that yielded nothing, that goes very much to intent across the board. This is a continuum, not just an isolated incident, and intent is a critical aspect of these offenses.

It's inconceivable there's no *Brady* material from interviews, from documents, from surveillance, from all the elements, all the components of investigation within two years of 9/11 about a possible link to terrorist activity, what that must have generated.

Then we have a gap from 2003 to 2007. We don't know anything about 2003 to 2007, whether Mr. Moalin was still under surveillance from the wiretap. We don't know anything about that. We don't even know if assistants here know what was the investigative product that was generated between those dates, if any.

Then we have the 2007 NSA referral back to the F.B.I. of the information collected subject to Section 215. The Deputy Director of the F.B.I., Joyce, says, quote, "Indirect contact with known terrorists overseas," close quote. He also said, "Indirect contact with an extremist outside the United States."

The head of the NSA has said, in 2007, "We saw him talking

to a facilitator in Somali." And by "saw," he means colloquially, obviously, records, the business records that were collected pursuant to 215, and "him" is Basaaly Moalin. That's important, too, in the context that it's indirect, indirect, facilitator.

The jury had a reasonable doubt that it was Aden Ayrow on those telephone calls that were intercepted pursuant to the FISA. It could not have convicted Mr. Moalin. It could not have convicted anyone.

Moving on to the legal issues, something that was released at the end of September that I was not aware of until after we had filed our reply. It's a 67-page analysis, and in many ways a history, a very comprehensive history, of the bulk data collection program, Section 215, by David Kris. David Kris, who from 2009 to 2011 was the Assistant Attorney General for National Security. He had also been in DOJ in the 1990s. And his responsibilities from 2009 to 2011 included responsibility for counterterrorism enforcement and intelligence oversight. And in the 1990's, he was also involved in intelligence and FISA aspects and has been a rather consistent commentator on FISA and is the author of a leading treatise used in law schools on national security these days, a relatively current one in terms of when it was first published.

And he -- in his paper, he notes that back in 2006, when Congress was authorizing Section 215, the FISC was not -- we

don't have any FISC opinions from there, so we are a little bit in the dark about what the program was essentially supposed to do. And also he says that -- quoting here from page 56 -- "The briefings and other historical evidence raised a question with Congress's repeated reauthorization of the tangible things provision" -- and that's Section 215 -- "effectively incorporates the FISC's interpretation of the law and leads, as to the authorized scope of collection, such that even if it had been erroneous when first issued, it is now by definition correct." So that raises a question about -- he is looking at a current -- he is analyzing from the current perspective.

But when he says, even if erroneous, it raises a question about whether or not, in 2006 and 2007, when NSA was operating, when it collected this material with respect to Mr. Moalin, whether it in fact was consistent with the statutory mandate and with the Fourth Amendment.

People who wrote the Patriot Act -- which is where Section 215 was amended; initially in 1998, but then expanded for all tangible things, business records -- essentially said this is not the intention of that section, this bulk data collection of all calls.

There's a question of relevance because it's supposed to be relevant to the investigation, yet the relevance occurs after the collection. It's collected in bulk. It's axiomatic, that every record cannot be relevant. And Mr. Kris notes that

as well. It is a limitless principle if one says that collection itself of bulk data is somehow relevant. The relevance comes later. That's when they extract and compare. And that's where it's relevant. So it's not relevant when they seize it, when they collect it. So in that sense, it is contrary to the statutory mandate and in conflict with it.

Also, Mr. Kris acknowledges that while the 2006 and 2007 standard was supposed to be consistent with grand jury relevance, he acknowledges that no Court has ever endorsed a grand jury subpoena as broad as the metadata bulk collection involved in Section 215 during this time period.

And by the way, the two FISC opinions issued -- one in August and again in October -- that seek to justify the program do not address this relevance question.

Also, blog posts from Marty Lederman -- L-E-D-E-R-M-A-N -- formerly Deputy Assistant Attorney General at OLC, now a professor at Georgetown Law School, who describes the opinion, the August opinion, as inadequate and talks about the relevance issue as well.

Also -- and some of these opinions are in our papers. Judge Walton's opinion in 2009 from the FISC, which details the problems that NSA had in implementing this, in compliance with the statute, and the constitution and instituting protocols. That's 2009, two years after the events occurring here.

There's also -- this is not in our papers either -- the

Electronic Communications Procedures Act, ECPA. That's 18, 2702, subsection (a)(3). There's a prohibition on what can be obtained from service providers. And there's an exception in there, specific exceptions, but Section 215 is not among them. And as a result, this collection is in conflict with that statute as well.

Also, the government, in its applications, as we know from the authorizing orders by the FISC, which we -- which some have been released, going back years -- that the government told the FISC that the Section 215 program was necessary, indispensable to counterterrorism investigation, yet the government has already begun to back away from that.

And this is something, again, that has occurred since we filed our papers; that in the litigation in New York, the *ACLU v. Clapper,* C-L-A-P-P-E-R, in that litigation, the government has backed away from the notion of necessity and said, "It's one of our tools. It might not be feasible if we didn't have this." And they have -- and also in litigation involving the solicitor general, they have taken the position the authorizations standard is not one of necessity.

So even if that's correct today, it still involves a misrepresentation to the FISC at the time that the authorization was provided. There's also a problem with minimization. And again, this is something that's not in our papers, about the specifics of this. We talk about

minimization, but we don't talk about the specific issue that I will raise now, which is in March of 2008, the Inspector General for the F.B.I., Glenn Fine -- I am sorry -- DOJ, Glenn Fine, issued a report. And he notes that, as of December 2007 -- which is after this episode occurs -- that the intelligence community had still failed to define, quote, "U.S. person identifying information," close quote, meaning that the ability to identify Mr. Moalin as a "U.S. person," which involves all sorts of other precautionary measures and prohibitions, was not even defined at the time that the transfer of information was made from NSA and the collection was made by NSA to F.B.I.

That's at page -- that's footnote 71, page 78 of that report, issued March of 2008.

And then page 81 to 83, Inspector General Fine goes on to state that the minimization protocols that had been instituted prior to 2008 -- which again includes the time period we are talking about now relevant to this motion -- were inadequate and did not meet the standards for the Reauthorization Act, which was passed in 2006, and then again -- the 2006 one was the one that he was addressing. So --

THE COURT: Can we back up just a moment, Mr. Dratel?

MR. DRATEL: Sure.

THE COURT: On the legal front, you began this part of your argument with an analysis on legal issues, and a while

back you said any analysis of legal issues must be viewed through the Constitutional lens. There has to be a Constitutional analysis.

And let's assume for a moment, for the sake of our discussion, that you had bulk collection under 215 that swept too broadly pursuant to the enabling statute. How does that impact the Constitutional analysis and whether or not there was a Fourth Amendment violation here? Given that one has no reasonable expectation of privacy in metadata, to collecting metadata which pretty much reflects a consistent line of authority from *Smith*, all the way through *Reed*, the *Reed* case, in this circuit.

MR. DRATEL: Well, Your Honor, I think that's changing. And I don't think that's necessarily -- even *Smith*, footnote 5 of *Smith* said the reasonable expectation of privacy is a normative question and not an absolute question. And I think that has dramatically changed as the potentially plurality majority of the concurring justices in *Jones* noted that this is a changing --

THE COURT: Well, on an individual level, one has no -- there's no reasonable expectation of privacy with respect to telephone metadata, is there?

MR. DRATEL: No, I think there is. And I think the courts will find that. And this Court is duly constituted and empowered to do so based on all the things we have provided,

but there is more than that. There's more than that.

THE COURT: What has changed, then? What has changed since the seminal case of *Smith* that somehow transposes metadata from not being recognized in terms of Fourth Amendment protection to being recognized irrespective of the 215 program? What is there on the individual level that changes that?

MR. DRATEL: What changes that -- and there are several aspects of it. One is that you have the Supreme Court cases that establish that if you do things that are outside of the range of the ordinary, such as -- whether it's a thermal sensor, or the drug-sniffing dog or the GPS in *Jones*, if you do things outside of that ordinary context, it becomes different than just simply, as the case in *Smith*, a two-day, one phone number, pen register; very different than the context of what people expect the government will have access to, without any standard whatsoever, without any protection whatsoever, has changed dramatically, not only because of the explosion of technology, not only because we are tethered inextricably and --

THE COURT: What the Fourth Amendment analysis I am asking right now -- you seem to be making an argument -- it's almost an argument which is tantamount to governmental misconduct. Because you have government engaging in misconduct in the form of the scope of bulk metadata information under 215 that in a particular case, the remedy for such an overreach is

to invalidate a conviction even where there may not be any Fourth Amendment violation occurring in terms of traditional Fourth Amendment jurisprudence. That seems to be the argument, but I don't know what authority exists for that if that's the argument.

MR. DRATEL: That is not the argument, Your Honor. I am not talking about outrageous government conduct, but government conduct that requires something more than was done in this case, and the "something more" is the conformance with the Fourth Amendment.

And in *Jones* -- just read Justice Sotomayor's position about expectation of privacy. "More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. People disclose the phone numbers that they dial or text to the cellular providers, the URLs they visit and e-mail addresses with which they correspond to internet service providers, and the books, groceries, and medications they purchase to online retailers. I would not assume all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection."

And there's more. Justice Alito -- it's repeated throughout the decision.

THE COURT: Obviously, that was a concern for certain

members of the Court in *Jones*. But of course, *Jones* went down a different path.

MR. DRATEL: But it presaged what everyone, I think, recognizes, which is that it's a different world, and a two-day pen register with one phone number. And I think making it a bulk collection question as opposed to individual doesn't solve the problem because the fact that there's no probable cause for the individual doesn't save it. In other words, exercising a general warrant doesn't save the warrant because you have a particular thing; it invalidates the warrant. So even with a warrant, something that has no contour does not pass Fourth Amendment muster. And here, we don't even have a warrant in that regard. We don't even have a specific target.

There is more to it than that. There's several layers. Not just the collection, it's what is done with the collection.

Let's go back and look at some other aspects of this. And I have actually some -- we prepared some slides, essentially. We don't have the Elmo today. But I will pass a copy to the government and, if I may, to the Court. Thanks.

The first one, just looking at the FISA application -- and obviously, we haven't seen it.

THE COURT: These appear to be illustrative of your arguments --

MR. DRATEL: Yes.

THE COURT: -- your diagrams?

If you wish to have them made a part of the record, we certainly may, but these seem to be only illustrative of your arguments; is that correct?

MR. DRATEL: That's correct. And if they could be made part of the record, Your Honor, that would be -- I would appreciate that simply because I will be speaking of them in a way that you and the government can view them, so I don't have to do orally what is texturally supplied or illustrated by the diagram.

THE COURT: We will make it Exhibit A.

MR. DRATEL: Thank you, Your Honor.

(Defendants' Exhibit A received into evidence.)

MR. DRATEL: Looking just at the FISA application first -- as I said, which we haven't seen -- but the question is what contributed to that FISA application? You could have other FISA's; you could have 215; you could have Section 702; you could have executive order 2333; human intelligence -- this may not even be everything. There may be other things as well that contributed.

But the point is that along -- all along this chain, there's a Fourth Amendment question of what goes into the FISA application. And the 215 -- and go to the next slide, which we will call B, Your Honor, if we may.

(Defendants' Exhibit B received into evidence.)

MR. DRATEL: On the right, we have terrorist

facilitator. That's the person whom Mr. Moalin allegedly had -- or at least in the 215 collection, according to NSA, connected him indirectly to a terrorist facilitator.

So, first question is how is that person identified as a terrorist facilitator? Again, the same possible sources that generate that information occur on the left side of the diagram. But we don't know the validity of any particular piece of that as to whether or not it meets either statutory or Constitutional muster, leaving completely aside the question of 215.

If we go to C, we work in the opposite direction. We have a terrorist facilitator. And then we don't know -- what they call hops; meaning the contact chain -- we don't know how many hops it took to get to Mr. Moalin, but it could use up to three hops. So what was used to establish Mr. Moalin's connection with the terrorist facilitator? And again, under the same elements and same components could go in there, so the FISA application is derived from elements that require a Constitutional analysis as to whether they are legitimate or not.

And -- if we could make that Exhibit C, Your Honor, please.

(Defendants' Exhibit C received into evidence.)

MR. DRATEL: And then the Exhibit D is a quote from the primary bulk order, issued by the FISC, said, "The Court

understands that NSA may apply the full range of SIGINT" -- in caps; that's signal intelligence -- "analytic tradecraft to the results of intelligence analysis queries of the collected BR metadata." "BR" being business records.

And the importance of that is essentially confirming what we have seen in the first few slides, but also noting that these records are not just simply transferred on their own. It's not like they pulled out a number and gave it to the F.B.I. They subjected it to comparative analysis with all sorts of other information. We don't know how that was acquired. We don't know whether it was legitimate or not.

And that's one of the problems. That's one of the problems of this whole opaque -- this completely opaque process, at least for us. And to me, that's what is important, is to have a process by which both sides get to analyze the facts.

And then the next one, which I would like to make -- did I make the other one D? If that's D, was the quotation, and then E would be the next slide, which talks about automated evaluative analytics, which all of these components are mixed together, coming and going, essentially to reinforce each other, and that's how this process occurs.

(Defendants' Exhibits D and E received into evidence.)

MR. DRATEL: And they couldn't have gotten to FISA based purely on the 215 collection information on that phone

number. There had to be more. And the "more" could very well be this. And we ask the Court to go back over the FISA. We would like to see it, too, but I don't know that we are going to get it, but we renew our motion for that purpose, and we have done that.

But even the Court itself has to go back over this whole process to determine the legitimacy of how this was done. If the Court wasn't told, it needs to know because that's essentially what is under the surface. There is the tip of the iceberg and then there's 90 percent of the iceberg underneath the surface.

And if I could go to F, another illustration of the same concept, which is either FISA or 215 is also the product of all of these other -- so the analysis that led to the pulling of that information from 215 about terrorist facilitator and Mr. Moalin has to come from comparison with other information. It doesn't exist out there on its own. Someone didn't see this and say, "This is who it is," and give it to the F.B.I. It's done in this holistic way. And the problem with the holistic way is each of the components has to be legitimate.

Another issue that I just want to raise but is not in our papers that some commentators have raised since we filed, is the concept of the rule of lenity applying to 215. And applying the rule of lenity to 215 would be construed obviously against the government, that it's -- rather, it's an overly

expansive interpretation of 215.

And also, in the context of what we were just discussing in terms of the slides, a case that we don't cite -- but we do cite other cases for the same principle -- it's *United States v. Barton*, 995 F.2d 931, Ninth Circuit, 1993, that it is a due process violation to deny the defendant information with respect to a suppression hearing that could have enabled the defendant to challenge the truthfulness of allegations for a search warrant. And I think that applies here in this context as well, not necessarily only because of truthfulness, because they talk about *Brady*. It's really a question of impeaching it. And so, *Brady* must apply to the suppression hearing in that context. That's what *Barton* stands for.

I wanted to shift to 702, and the government's argument is categorical on 702, which is essentially that, well, it is not used, so therefore, there's no issue to resolve.

Couple of things. One is that the slides apply to 702 the same way they apply here. We do not know to what extent 702 contributed or other things contributed to 702 in this regard, so the question of "derived from" is really far more complex than where the government put a particular conversation in evidence. The question is what went into the FISA, what went into the components of the FISA, how that was all mixed together.

Also Section 702, which is 50 U.S.C. 1881a, has certain

limitations, in subsection (b) -- and we didn't get into this in too much detail in the papers, so I wanted to cover it here -- which is that one of the limitations, you can't have known targeting of U.S. persons in the U.S. known at the time of the acquisition of the communication. So if you know someone is in the U.S. when you are acquiring a communication, you can't acquire that communication.

Well, we know from the January 28th e-mails that they were acquiring communications of Mr. Moalin's, knowing full well there was already a FISA on him, that another agency was doing that. So I don't see how there was not knowledge by the intelligence community that he was in the U.S.

And the same thing is if the purpose was to target a particularly known person in the U.S., it's also not permitted -- 702 is not permitted.

And there are issues about 702 that I think require scrutiny. One, the government has not said there were no interceptions or no other interceptions other than the one referred to in the January 28, which is just an incompleted phone call. But we haven't heard that there weren't other interceptions pursuant to the same monitoring done by the, quote, "other agency" that's referred to in the e-mail.

The government has not said there was no content interception under this -- by that other agency under the same monitoring. We don't know what the nature of that -- if there

was content interception, we don't know what the nature of it was. It could have been exculpatory. We don't know. The caller could have identified themselves as someone other than Ayrow. And again, this is about distinguishing between the prosecutors here and the intelligence community. The intelligence community has no clue what *Brady* is.

I was in a case in which the agency that was doing an intelligence operation, back when they had cassettes, repeatedly taped over the cassettes because they made their own notes of what they needed, so lost to us was the entire range of conversations. They don't know *Brady*. They are not trained in *Brady*. That's not their job.

And whether they provide it -- whether they keep it or provide it to prosecutors is a very serious question, and repeated over and over again in these cases.

And the question also is how did the government conclude that it was Ayrow -- in the January 20 e-mail, that he was the person trying to reach Mr. Moalin? How did it conclude that? Did it have a phone number? Some other evidence? Was the conclusion viable?

And if it's mistaken -- which we should have the opportunity to test because no one came in here and said that was Ayrow on the call. It's all circumstantial. If we are not allowed to test that conclusion, it is not fair. That is what exculpatory evidence, we could -- if it's a mistaken

conclusion, that breaks this case apart.

With respect to standing -- and I know the Court talked about *Smith*. That only addresses the 215 issue. It doesn't address the other issues that are involved in interception, other things that -- it is not necessarily metadata that's used. Even though I think *Smith* has been overcome by the series of Supreme Court cases, *Jardines* and *Kyllo* and *Jones*. But also, the standing issue, for 215, 50 U.S.C. 1801(f)(2) says acquisition. And content includes metadata in the context of what acquisition -- not acquisition, but what an interception means. Metadata is included under the statute. And acquisition covers a much broader context than interceptions. Acquisition is acquisition by the 215 orders.

In *Jewel*, in the Ninth Circuit, 673 F.3d 902, at 906, Ninth Circuit, 2011, they provided the defendants in a declaratory judgment action standing for bulk metadata collection.

With respect to 702, the government again says -- the government takes a categorial position; we didn't use it because it wasn't in evidence. But at the same time, agrees a person is someone subject to electronic surveillance, not interception, but subject to electronic surveillance. It is a much broader concept.

And Title 3 does have language that includes what we are talking about, and I submit that that's in order that it be

consistent with the Fourth Amendment.

And the concept of taint that we are talking about is also illustrated by the Court's decision in the Southern District of New York, in the *Ghailani* case --

THE COURT: What is your argument with respect to Title 3 again?

MR. DRATEL: Just --

THE COURT: What is the parity of reading --

MR. DRATEL: An aggrieved person is not necessarily -- it is a broader concept than just what is used at trial against him.

THE COURT: So you are limiting that to standing?

MR. DRATEL: Yes, just talking about standing.

But in terms of the taint issue, the *Ghailani*, G-H-A-I-L-A-N-I, in the Southern District of New York -- we have cited that in our papers -- but the concept that information derived from the torture of the defendant then leads to a witness who is then interrogated and becomes -- and is called as a witness at trial, was precluded by the Court. And that demonstrates that the question of taint is -- does not -- is not based solely on what the character of the evidence is, in the sense that a witness usually is not precludable. But here, because of the fruit of the poisonous tree, this witness was identified solely by the illegal conduct of torture, that wound up being suppressible.

And in the context of derived from, whether something is used in the 702 context for purpose of giving the Court -- giving the -- giving Mr. Moalin essentially standing and also for the purpose of, of course, remedy, again the slides show this is not just a question derived from putting in evidence. It's truly about the holistic way that these intelligence tools are used in conjunction with each other.

So we are asking for a remedy that is within the Court's province to grant. One is suppression; another, short of that, would be discovery, to find out, finally, what this case is built on in terms of the acquisition of evidence and the chain of acquisition; for the Court to revisit the materials provided by the government, ex parte, in regard to the FISA, to analyze that in the context of what has been disclosed since June; and also, to demand more from the government to the extent it wasn't provided initially; and again, to defer until we have a full record of this, including the 2006 opinion, that apparently will be -- that may very well be disclosed Monday.

There's a schedule for disclosure. It's been put back many times. And I am not suggesting about any delay, because a substantial amount was due to the government shutdown. And it's been revised from time to time, and that happens in litigation anyway. But the fact is it's coming soon and could have an impact on the Court's decision.

Thank you very much for your time.

THE COURT: Thank you very much Mr. Dratel.

Ms. Moreno?

MS. MORENO: Your Honor, I would submit and join with respect -- on behalf of Mr. Mohamud and incorporate Mr. Dratel's very thoughtful arguments on behalf of my client.

THE COURT: Thank you.

Mr. Ghappour?

MR. GHAPPOUR: Your Honor, one quick addition.

Drawing your attention to Exhibit C, I would just like to point out that an assertion that Mr. Moalin is in indirect contact with a terrorist facilitator -- in other words, something like that could be interpreted by Mr. Moalin being the second or third hop on the contact chain shown on the right; however, a statement Mr. Moalin is talking to a terrorist facilitator implies that there is something missing that we are not seeing here.

And just to underscore Mr. Dratel's point, that we believe that this gap is what the automated analytics fills in, whether they are automated or not. We believe that this gap necessarily derives from other intelligence, whether it be human intelligence, 702 intelligence, other 215 intelligence, and Your Honor would have to rule on the legality of that in order to reach a conclusion that the application, in and of itself, was not derived from unlawful evidence.

THE COURT: Thank you, Mr. Ghappour.

Mr. Durkin?

MR. DURKIN: Judge, I would adopt Mr. Dratel's argument. I have only a brief comment on one small section, and that would be my issue.

THE COURT: Sure.

MR. DURKIN: It's with respect to the final argument. I make reference to it in our reply, on page 21. The court should order disclosure to clear counsel of FISA applications and the CIPA 4 motions.

And my comment goes to this effect, that I think what we have witnessed and what we are witnessing is a real paradigm shift in the way cases are being prosecuted in Title 3 courts now and in the district courts, and I will put this in perspective.

I am teaching a class on national security at Loyola Chicago law school, and last night we were talking about secret evidence, of all things. And I sent the government's response to my class last night, while I was on the airplane -- wonderful world we live in; you can now have wifi in the airplane -- and I said, "No matter how many times I see these, and I have seen a lot of them, I am stunned, always, that I am in an American courtroom, with pleadings that look like this." (Indicating.)

I get it. I understand. But I have a visceral --

THE COURT: That doesn't convert very well on the

record. You are talking about a heavily redacted --

MR. DURKIN: I am talking about the government's public filing that -- at least on our number, it's document 355. And I am referring to -- what I was just showing you was pages 8 through 12 -- I am sorry -- 8 through 11, that are completely redacted. There's other redactions, significant redactions throughout.

And I say this respectfully because, I think you know, I was an assistant U.S. attorney longer than I want to talk about. But I have been doing this for 40 years. I was a prosecutor from '78 to '84, and I have always been very proud of that. And my only real contribution to this reply that Mr. Dratel wrote -- which I think is excellent -- is footnote 1 on page 4, which talks about the fact that we are talking about the government -- when we use the term "government," we are talking about the intelligence agencies now, big G. And when we talk about these gentlemen, we are talking about prosecutors, and that is the paradigm shift I have seen.

I first saw it in the Guantanamo, in the military commissions.

One of things you may be accustomed to -- and I think all lawyers who have done this on either side -- is the ability to trust each other and to talk to each other lawyer to lawyer. And I think that's what our system is built upon because I think -- I don't know how judges think, but I have watched

judges think long enough to know I think they come to trust people. And when people say things, they can rely on it. And I think that's how our system has worked up until recently because we don't any longer have a system in which criminal investigative agencies are prosecuting cases. We have intelligence-gathering agencies dictating prosecutions.

And I don't mean that critically of these people. (Indicating.)

What I noticed happening is when you try to talk lawyer to lawyer now, and I first saw this in the military commissions in Guantanamo, and you try to talk lawyer to lawyer, and normally the lawyers will talk back to you and say what you know and we all honor each other's secrets and so forth; what you get now is, "We will have to get back to you." And this started gnawing at me four years ago.

It's now, I think, getting clearer -- and you see it in the FISC opinions, these disclosed FISC opinions, that the information that the intelligence agencies are dribbling out to the government is not accurate. We even have Mr. Clapper, in his famous Congressional testimony, saying he had to tell the least untruth or whatever he said.

And I only say that in the sense that that's a significant paradigm shift. Because I trust William Cole and these people I have always trusted the U.S. attorney's office. I have fought with them a lot, but I was always trust them.

I am not sure that you can trust them -- I think you can still trust them as individuals. But I don't think they have the information anymore. I think they are operating on only what's given to them.

And the reason I say this is significant -- and it really comes up in this Kris article that Mr. Dratel referenced. I thought we had it in our papers, but in case it's not -- I don't think it is. But it's on the -- it's -- the author is David S. Kris. It's titled, "On the Bulk Collection of Tangible Things." And it's a Lawfare research paper series, Volume 1, Number 4, September 29 of this year. And he makes reference to a point about a lawyer's obligation in ex parte proceedings. And this is what in effect the government is asking you to do, is to just have these things ex parte.

And he cites the ABA model rule 3.3D, and talks about, "In an ex parte proceeding, the lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision whether or not the facts are adverse."

Now, I don't doubt that the U.S. attorneys and Department of Justice lawyers will relate to you what they know. It's what they don't know, is the problem. And I would ask you to consider that.

I think, you know -- as a result of that, I don't think what we are asking for is so extraordinary. We are cleared

counsel. I think what has happened -- and you see this in a lot of the scholarly comments about what is wrong with the FISC Court, and should there be an adversary put into the FISC. And I don't want to get into that debate, but the principle is the same.

I don't know that you can rely anymore on what they know. Because I think they are deliberately kept in the dark, and that's not criticism of them, by any means (indicating.) But I think it is happening, and I ask you to take that into account because it's -- I just don't think you can read these FISC opinions and come away with too many different conclusions.

I mean, how many times did those government prosecutors -- were they really lying to the FISC Court or were they just given bad information?

I don't know what happened here. I think we should know. And I don't think it would hurt the system if we were permitted that. I think we have a different paradigm going on, and I'd ask you to consider that because it took me a long time to see it. It started bothering me down in Guantanamo, and it's bothered me ever since. I have handled a lot of these cases, and you just can't have lawyer-to-lawyer conversations anymore because everything has to get cleared, somewhere, up wherever that may be. I don't know. That's my two cents.

THE COURT: Thank you, Mr. Durkin.

MR. DRATEL: Your Honor, may I clarify one thing?

THE COURT: Yes.

MR. DRATEL: If it's not clear to my colleagues, then I want to clarify it. That is with respect to the Electronic Communications Procedures Act, ECPA, 18 U.S.C. 2702(b)(3), and the limitations on what can be obtained from a service provider, and the fact that Section 215 collection is not included, that's not a standing issue; that's a substantive issue, that it would preclude the acquisition of this bulk data as a matter of substance and not as just a standing issue.

Thank you, Your Honor.

THE COURT: Mr. Cole?

MR. COLE: Thank you, Your Honor.

Well, there's a vigorous debate going on in this courtroom as well today, I guess, about the intelligence community, about FISA, about Section 215, about rights of privacy, and that's a good debate. It's going on in Congress and the media for sure, and the public debates it. But the issue here is not so much that debate and where it will come out and how it will impact our society; the issue is this is a criminal case and whether new trial ought to be granted. And I want to briefly respond to points made by Mr. Dratel.

I understand that because classified information is involved, defense counsel are forced -- and I am not criticizing them for this -- but they are forced to speculate as to what may or may not be because there are things redacted

from certain papers or some things are done under the law, through CIPA. But, even if we assume for a moment that all their speculation was correct -- and it isn't. And the Court has seen the FISA applications, reply; the Court has seen the CIPA submissions. And so even though the speculation is incorrect, in many particulars, even if it was, even if they are right about something that's been said, there would still be no basis for a new trial, and that would not be based on the ongoing debate about privacy; it would be based on established law.

First -- I won't belabor this point -- but there is no case law recognizing a Fourth Amendment interest in metadata. There just isn't. And the *Jones* case came out in 2012. That was years after the defense says metadata was collected on Mr. Moalin that they take issue with. The *Jones* case itself is tea leaves, the defense says, to what may be coming. Even if the *Jones* case had addressed the issue -- which it didn't -- even if it addressed metadata, it would have addressed it five years after the collection in this case.

There would be a good-faith exception even if there was a Fourth Amendment interest because not only has the FISC issued -- repeatedly upheld the present orders authorizing the telecommunication metadata collection, but there is a statute that authorizes it, there are Court opinions that authorize it, and there have been no Supreme Court or other opinions

invaliding it.

So not only is there no Fourth Amendment interest, even if one was emerging, as Mr. Dratel states -- which we take issue with -- but even if one did emerge, or was emerging, or even if *Jones* was leaning in that direction somehow in a concurrence, there still would not be a basis for suppression or new trial.

Also, he referenced the ECPA, also sometimes called the Stored Communications Act. Again, the problem with that is there is no suppression relief either. That's established under Ninth Circuit law. Your Honor has written about it in the *Qing Li* case. There is no suppression remedy.

And analogously, there is no suppression remedy under the 215 program if there's a statutory violation. There has been no citation of any authority suggesting that if there were a statutory violation that there would be a suppression remedy because none is provided in the statute. Congress did not provide it. And Congress knew how to provide suppression remedies because it provided it for other portions of FISA, but it did not provide it for the 215, just like it didn't provide it for the Stored Communications Act. And one can guess why, because Congress recognized no Fourth Amendment interest in those type of records. Also, there has been no identification of a statutory violation anyways.

And in fact, the FISA Court keeps issuing orders approving the program. And those are real courts and real judges

although there's been assertions today and other places that somehow their opinions don't matter. The government relies on them, certainly.

With respect to 702, again, counsel speculates about 702, and I understand why. It's not a criticism. But this Court already has seen the FISA applications. And we have explained again in the papers, our response, that the United States cannot enter into evidence or otherwise use or disclose in the course of prosecution of Moalin or his codefendants any 702 information that they obtained or derived in foreign intelligence collection as to which either Moalin or his codefendants were aggrieved. And that's just the case. We have stated it to the Court and provided the Court with the information.

The charts about analytics and what could or could not have been used, or was used, or may have been used, the Court has seen the FISA applications and knows what was relied upon in seeking authorization to collect the FISA calls that were used in this case.

I also want to mention just briefly the fact that the government's case was based on the calls collected. We argued to the jury that the calls, the FISA calls, established that the defendants were providing and intend to provide support to Al-Shabaab and terrorists. We weren't relying -- in our case in chief, there was no one who came in and testified that was

Ayrow on the telephone from some intelligence agency. We didn't rely on some analytics. We played the calls. And the jury had to decide based on argument from all sides whether they believed the calls showed intent to support Al-Shabaab.

The jury could have concluded that they weren't sure it was Ayrow, but they were dang sure it was someone from Al-Shabaab on the other end of the line. We, of course, strongly believe and argue that it was Aden Ayrow, but that was for the jury to decide upon the calls themselves. That what we relied upon. And the Court knows how we got those calls because the Court has seen the FISA application.

One moment, Your Honor.

For all those reasons, we believe that a new trial motion should be denied, and submit. Thank you.

THE COURT: Thank you.

Mr. Dratel, anything further?

MR. DRATEL: Thank you, Your Honor.

This is a criminal case. This is not a broad, abstract argument. This is about a human being -- four of them -- convicted based on the illegal acquisition of evidence used against them. And the fact that the calls were played and that was the evidence is like saying if a search warrant is based on a series of lies or illegal conduct by the government such as an illegal wiretap, the fact that you just put the evidence in -- we are not talking about that. That stands the Fourth

Amendment completely on its head; stands the whole system on its head.

You know, the government talks about *Jones* being five years after the collection of this metadata. Maybe this case would have been in front of the Supreme Court five years before *Jones* if we had only known this occurred. But this has all been secret. We don't get to know this until it comes out inadvertently, not from the government disclosure, no. But by disclosure made by a whistleblower, and the government's response, the government's justification of the case.

It's not good enough -- we are not good enough to get it to defend them, to defend Mr. Moalin -- I am sorry. I am exercised not by what the government has said, but by the whole process we have gone through. Because for three years, preparing this case, three years, I am not permitted to see what is necessary to defend him, but the minute someone comes out and tells the truth about what the government is doing in this country, the government says, "Oh, now we can disclose it, to justify what we have done." That's the only reason we know.

So to say *Jones* is five years after is to say yeah, five years after the government has hidden it for a decade.

Let's talk about good faith. Let's have a good-faith hearing. Let's have witnesses on the stand. Let's get to the facts, and let's talk about good faith. I am perfectly willing to do that. And then we will see if it applies as a legal

matter. But if they want to assert a good-faith defense, they better have a basis for it in fact, and we get to cross-examine.

And as I noted in my presentation, there are many other levels of Fourth Amendment analysis beyond just the *Smith* metadata question. And *Jewel* says metadata is covered in standing. It's a whole range of things that are collected in the course of these communications. That's not even a criminal case; that's a declaratory judgment action.

The government relies on the FISC opinion. Indeed, not only a secret body of facts, a secret body of law. Disclosed only because the government has been held to account, at least in the media, for what it's done the past 12 years.

The FISA application the Court has seen. That's just the application. Just like an ordinary warrant, the Court has the authority -- really, I think, the obligation -- to go beyond it to see what makes up that FISA application. If the FISA application is based on illegally or unlawfully obtained evidence, it is invalid. The Court must go beyond that based on the nature of how this process occurs.

And again, it's in our papers; something called Special Operation Division of the DEA, the concept of parallel construction. The intelligence agencies have instructed law enforcement agencies not to reveal certain conduct by the intelligence agencies in making cases. So what you do is you

build a parallel, sanitized pathway to the evidence leaving out the authentic origins, which are illegitimate.

I think the Court has to go beyond just the four corners of the FISA application, just as the Court would go beyond if someone came in with a warrant that talked about an informant, and you would ask, "Is he reliable?" You would ask things that are not in the warrant. "How did this happen? How did that happen?" You would do that. And I think it is incumbent upon the Court to do that here.

Thank you, Your Honor.

THE COURT: Thank you, Counsel, for your arguments. I do appreciate them.

And as I indicated previously, unless you are otherwise advised, I am taking the matter under submission now, and my intention is to consider your arguments and further points that were raised and issue an order by 2:00 p.m. tomorrow, which, obviously, assuming that the motion is denied, would call for the sentencings to go forward on Monday as already scheduled.

If there's any change in that, we have your contact information, and we will advise you immediately.

Mr. Dratel, assuming the sentencing goes forward on Monday, we will not be seeing you nor your client, because your matter has been continued to another date.

MR. DRATEL: No, that's Mr. Durkin, Your Honor.

THE COURT: I am sorry. I am looking at Mr. Durkin.

Mr. Durkin, so you know that your matter is scheduled for another time on behalf of Mr. Nasir?

MR. DURKIN: That's right.

THE COURT: The only reason we have an interpreter here is to aid Mr. Nasir -- your client, Mr. Durkin. So if the sentencings do go forward on Monday, I am not anticipating any need for interpreter services, and I just wanted to make that clear at this point.

MR. DURKIN: That's fine, Judge. I mean, could I have just one second?

(Counsel confers with defendant.)

MS. FONTIER: Your Honor, I am standing for another reason, on the interpreter issue as well but --

MR. DURKIN: Judge, he would just as soon be excused on Monday.

THE COURT: Yes. There is no need for you to be here. There is no need for your client be here on Monday, if the matter goes forward on Monday.

MR. DURKIN: Thank you.

THE COURT: Ms. Fontier?

MS. FONTIER: Mr. Moalin and Mr. Doreh have been transferred out of GEO and are currently being housed in Arizona. I raised this point on a prior conference call. If it's possible for Your Honor -- I know you can't necessarily order the marshals where to hold them or where they should be

placed or --

THE COURT: You remember your experience in this district. That's good.

MS. FONTIER: -- but if it's possible to make a very forceful recommendation that Mr. Moalin and Mr. Doreh remain in San Diego at either facility that would be --

THE COURT: I think that would be entirely reasonable. I think that would be entirely reasonable. In the past, the marshal has always cooperated. And I think there is a loose understanding, if not written in stone, that to the extent possible people in custody, awaiting sentencing, should be brought for local housing in sufficient advance of a scheduled sentencing hearing so that counsel have reasonable access to their clients. So I am not anticipating any difficulty with that request.

If there is anyone here, representatives of the marshals' office or otherwise, who has any concern about the request that was made or my response, I would like to give the marshal an opportunity to be heard while everyone is still here.

Would you like to be seen at the side of the bench with counsel?

THE MARSHAL: That would be fine, Your Honor.

(The following proceedings were heard at sidebar:)

THE MARSHAL: When is sentencing? Assuming --

THE COURT: Sentencing is set for Monday, next

Monday, and I would like to have everybody remain here locally; that is, the defendants remain here locally, not to return to Arizona. Do you think that will be an issue?

THE MARSHAL: I would like to say it won't. Typically, they would need to go back and be processed out of the facility they are being held at. And right now, the way it works in the district is once they are awaiting sentencing, that is when we put them in the facilities that are further away because there's a two- to three-month period, usually, waiting on PSR or whatnot. So that's why they were housed there.

I am -- I can make a phone call to the supervisor that actually oversees our facilities and see if it's going to be an issue. I don't foresee there being an issue with having them in the district. I don't know if they are going to have to go back and be outprocessed.

THE COURT: Why can't that be done administratively? We have people appearing remotely, and for arraignment purposes and other purposes. Why can't we have that done?

THE MARSHAL: Again, I don't think there will be an issue.

THE COURT: I don't want to put you on the spot. I want to give you an opportunity to contact the marshal staff; if necessary, contact Nellie Klein at MCC.

THE MARSHAL: And the only other issue would be,

assuming we have space, we have to have somewhere -- at one of the three facilities, there should be. That was pretty much it, as long as there's bed space.

THE COURT: If you want to make a call, or if necessary, I will call, talk to Nellie Klein.

THE MARSHAL: I can make a call and see where we stand, and if we need to have judicial -- actual minute order done.

THE COURT: Why don't we do this. We have been at it, gosh, just about an hour and a half. We will take a 15-minute recess at this point for purposes of allowing you to contact whomever you need to contact. We can have -- rather than having the defendants here in the courtroom, they can be taken back.

You can waive their presence for any further discussion on this particular issue, which is administrative and scheduling, and then we will reconvene in 15 minutes. You can let us know whether we need to do something further. Give Nellie a call.

MR. DRATEL: May I ask one other thing? If you could, to the extent that something is different than what we are hoping for, and even if it is, if there's a phone number or anything we could call to find out which of the facilities they might be at? And also -- and also, if they get taken back to Arizona to get processed, when they come back, to see them right away?

THE MARSHAL: I will make sure we have those answers and you know where your clients are.

THE COURT: And that is Corey Miller on behalf of the marshal service.

MR. COLE: If we go back on the record, we have one small administrative matter about the record we wanted to raise briefly to be sure it's cleared up, if we can do that before we break.

THE COURT: Let's hold up on miscellaneous matters, take a 15-minute recess at this point, and allow you to make that inquiry, and we will wrap up everything in 15.

THE MARSHAL: And the defendants aren't needed beyond that point?

THE COURT: Their appearance is waived from that point forward. If you wish to take them back to holding, you may do that.

THE MARSHAL: Thank you.

THE COURT: Thank you.

(The following proceedings were held in open court:)

THE COURT: Ladies and gentlemen, we will be in recess for approximately 15 minutes. Thank you.

(Recess taken from 2:55 p.m. to 3:12 p.m.)

THE COURT: I will inquire of the marshal what the good news is.

THE MARSHAL: Your Honor, Corey Miller on behalf of

the marshal service.

I spoke with our supervisor that takes care of our detention facilities. What we are going to do is the two clients in question are going to be sent back to San Luis this evening so they can be responsible for their personal effects or whatnot. They will be transferred back and come back on a bus in the morning and be transferred to a local facility.

THE COURT: Pending the sentencing hearings?

THE MARSHAL: Correct.

THE COURT: Is that acceptable, Counsel?

MS. FONTIER: It is, Your Honor.

THE MARSHAL: And I have given counsel my card so they can call me in the morning to get their location as to where they are being housed tomorrow morning.

THE COURT: Very good. I think we have agreement of all counsel here, Mr. Dratel, and Ms. Moreno, and Mr. Ghappour, that that would be a satisfactory resolution of this.

MS. MORENO: Your Honor, my client has not been moved. And this gentleman and I have had a conversation requesting that he not be moved, but if by some blip in the system --

THE COURT: Not even a field trip to Arizona?

MS. MORENO: No, please, Your Honor. And that I was actually staying here until Monday in order to work with him, so I am hoping that he will not be moved.

THE COURT: Very good.

THE MARSHAL: I am going to send a message and have it noted in our system to make sure the other two clients aren't moved pending sentencing.

THE COURT: Very good. I thank you very much for your time and effort in that regard. If anything comes up, any change that you are concerned about, please let me know right away so we can get anything -- any issue resolved quickly. Okay?

THE MARSHAL: Absolutely.

MS. FONTIER: Sorry, Your Honor. I just have one final issue. You raised the question of the interpreter. As you are aware, Mr. Moalin has not used the interpreter in any of the proceedings. He understands English very well and also, obviously, can communicate with us without difficulty.

When I met with him briefly earlier today, he said he's hoping -- intending to address the Court at the time of his sentencing, and he does feel more comfortable expressing himself fully in the Somali language.

I indicated to him it was my preference he speak in English.

THE COURT: I would prefer that. It's his choice, but I would prefer that. Obviously, I can better understand what he is saying without the intervening interpretation. So much is lost, sometimes, just in interpretation.

MS. FONTIER: That was the exact sentiment I expressed to him, Your Honor. I only raise it because -- I will address it with him tomorrow afternoon, when he is back in the fine state of California, and if he says that he would be much more comfortable, I will just alert the Court through a phone call to your chambers so the Court is aware he is requesting an interpreter; otherwise, you can assume he is not.

MR. DRATEL: And we will work with him on his remarks so that he is comfortable in English the best we can.

THE COURT: I believe our interpreter has traveled from Minneapolis?

THE INTERPRETER: No, Your Honor. I am locally here.

THE COURT: You will be available, then, Monday if needed?

THE INTERPRETER: Yes, Your Honor.

THE COURT: Very good. We need to let you know for your planning. So I would only ask that counsel keep our interpreter in the loop at this point. After you have had an opportunity to speak with Mr. Moalin, please let the interpreter know so his schedule can be appropriately adjusted.

THE INTERPRETER: Thank you, Your Honor.

MS. FONTIER: Again, it is my assumption and preference that Mr. Moalin speak in English, and if that is different, I will alert the Court and the interpreter tomorrow so everyone is aware.

THE COURT: Very good.

Ms. Moreno, anything from you on that score?

MS. MORENO: No.

THE COURT: Mr. Ghappour?

MR. GHAPPOUR: No, Your Honor. Thank you.

THE COURT: And Mr. Cole, you had one matter you wanted to discuss administratively?

MR. COLE: Just a small matter, make sure the Court is aware. You recall in the trial, there was a lot of videotape that was played, of the depositions. And one loose end was perfecting the record for appeal, make sure that there was an exhibit containing the portions that were played at trial. And counsel has been working with us on that, and my understanding is they are on the verge of having that finalized. But we are just concerned that we are a few days out of sentencing -- at least sentencing for three of the defendants -- without yet the record having the disk of what was played at trial. And we just wanted to be sure everyone was on the same page, that that still needs to be done, and the record perfected in that way.

THE COURT: Without the disks that were played?

MR. COLE: Well, the issue was, when we left trial, Your Honor -- and this is my recollection, and counsel can chime in if I have it wrong -- I think we are going to -- there were all these depositions, but we only played portions of them

at trial. So a disk was going to be created for the record that the parties would agree was the portions played at the trial. And that was going to become part of the record, essentially, of what --

THE COURT: Weren't you working from a disk or perhaps more than one disk with only those excerpts that were played before the jury? I know you were using the Sanction software, but I thought that had been ultimately converted.

MR. DRATEL: What happened was we -- I think towards the end of trial, we began to shave off pieces of the deposition to try to get finished faster, and in a certain period of time, and we had agreed on certain -- basically, to edit out some parts of it that ended up being different. And you would have to go to a certain spot; play; go to a certain spot; play. Even though we had a disk of the testimony that, after the Court's ruling on admissibility, had been created; nevertheless, that was in fact different than what was played to the jury at least for the last couple of witnesses. I think for the first few witnesses, it was not a problem, but the last two or three witnesses, we did more editing during the trial.

THE COURT: You feel you can get together and perfect that?

MR. COLE: I don't think there is any dispute at all over what needs to be done; just the logistical issue of having it finished by the defense. They have the deposition disks and

they know what they want to have on the disks, so it is a matter of making sure Your Honor was aware.

We feel that they are working on it. I don't think it is an issue. But sentencing is just around the corner now, and we just want to make sure those are finished so it will be available for future review.

THE COURT: Well, right. They should be finished in any event, either for future review, or if the matter were to result in a retrial, you would have to have that record as well. So you really do need to quicken the pace on getting that last loose end tied up.

Are there any other matters at this time before we adjourn for the day?

MR. COLE: No, Your Honor.

MR. DRATEL: No, Your Honor.

MS. FONTIER: No, Your Honor.

MS. MORENO: No, Your Honor.

THE COURT: Again, thank you, Counsel, for your arguments today. The schedule will be as I described it earlier unless there's a change. We have all your contact information. We will keep you immediately advised if there is any change in scheduling. Okay?

MR. DRATEL: Thank you, Your Honor.

THE COURT: Thank you.

(End of proceedings at 3:20 p.m.) -o0o-

C-E-R-T-I-F-I-C-A-T-I-O-N

I hereby certify that I am a duly appointed, qualified and acting official Court Reporter for the United States District Court; that the foregoing is a true and correct transcript of the proceedings had in the aforementioned cause; that said transcript is a true and correct transcription of my stenographic notes; and that the format used herein complies with rules and requirements of the United States Judicial Conference.

DATED: January 31, 2014, at San Diego, California.

/s/ Chari L. Possell
_____
Chari L. Possell
CSR No. 9944, RPR, CRR

I N D E X

EXHIBITS ADMITTED INTO EVIDENCE: